Kentucky Law Journal

Volume 22 | Issue 3 Article 4

1934

Restatement of the Law of Contracts Annotated with Kentucky Decisions

Frank Murray
University of Kentucky

AMERICAN LAW INSTITUTE'S

RESTATEMENT OF THE LAW OF CONTRACTS ANNOTATED WITH KENTUCKY DECISIONS*

By FRANK MURRAY**

TOPIC D. INFORMAL CONTRACTS WITHOUT ASSENT OR CONSIDERATION

Section 85. ASSENT OR CONSIDERATION UNNECESSARY IN CASES ENUMERATED IN SECTIONS 86-90.

Neither an expression of assent, unless the promise is in terms conditional upon such an expression, nor consideration is requisite for the formation of an informal contract in the cases enumerated in Sections 86 to 90.

---

*This is a continuation of the Kentucky Annotations to the Restatement of Contracts. The work is being done by Professor Frank Murray of the College of Law, University of Kentucky in cooperation with the Kentucky State Bar Association.

**Frank Murray, A. B., Univ. of Montana; LL. B. 1925, Univ. of Montana; S. J. D. 1930, Harvard Univ.; Asst. Prof. of Law, Univ. of Montana School of Law, 1928-29; Prof. of Law, Univ. of Kentucky College of Law since 1930.

Annotation:

We have in general reached the same result that would be attained by a strict application of this section, but with entirely different language and reasoning. The doctrine is a remnant of the idea of moral consideration and that explanation is still used by our courts. In other cases the new promise is spoken of as a "ratification," "affirmance" or even "waiver."

Regardless of whether it would be better in some cases to frankly acknowledge these promises as contracts without consideration, it is clear that our decisions would not allow this explanation in some situations. If the new promise is a contract it could be made the foundation of an action. This is true of a promise made after the original cause is barred by the Statute of Limitations, and there the suit *must* be on the new promise — *Wurth* v. *City of Paducah*, 116 Ky. 403, 76 S. W. 143; *Turner* v. *Everett*, 5 K. L. R. 325; *West* v. *Williams & Son*, 202 Ky. 382, 259 S. W. 1015. But this section refers also to promises made before the statute has run. In this case the new promise cannot be the foundation of an action — *Gilmore* v. *Green*, 77 Ky. (14 Bush) 772; *Carr's Exr.* v. *Robinson*, 71 Ky. (8 Bush) 269; *Hopkins* v. *Stout*, 69 Ky. (6 Bush) 375. This section includes promises to perform a voidable duty (Sec. 89) such as a promise by an adult to perform a contract entered into during infancy. Here again it is doubtful if our Court considers the new promise as a contract in itself since it is proper that suit should be brought on the old obligation. It is said, "the real effect of a confirmation is only to prevent an avoidance" — *Best* v. *Givens*, 42 Ky. (3 B. M.) 72. Again when the suit must be on the original obligation, the character of its evidence, and not that of the new promise determine the period of limitation— *Abner* v. *York*, 19 K. L. R. 643, 41 S. W. 309; *Gilmore* v. *Green*, supra; *Hopkins* v. *Stout*, supra; *Sisk Adm.* v. *Sisk's Adr.*, 192 Ky. 672, 234 S. W. 296.

This section states that assent is required only when the new promise is conditional upon such expression. Assent was required in *Farrell's Adm.* v. *Records*, 187 Ky. 468, 219 S. W. 792 (Promise to pay part if accepted in full satisfaction). *Brashears* v. *Combs*, 174 Ky. 344, 192 S. W. 482, apparently goes beyond this in requiring an acceptance of any conditional promise, as a promise to pay "when able," although the assent may be implied from an attempt to enforce the promise.

Section 86. PROMISE TO PAY A DEBT IS BINDING THOUGH THE DEBT IS BARRED BY THE STATUTE OF LIMITATIONS.

1. Except as stated in Section 93, a promise to fulfill all or part of an antecedent contractual or quasi-contractual duty

for the payment of money due from the promisor, other than a judgment, is binding if the antecedent duty was once enforceable by direct action, and is either still so enforceable or would be except for the effect of a statute of limitations.

2. The following facts operate as such a promise as that stated in Subsection (1) unless other circumstances indicate a different intention:

(a) A voluntary acknowledgment to the obligee, admitting the the present existence of such an antecedent duty as is described in Subsection (1);

(b) A voluntary transfer of money, a negotiable instrument, or other property to the obligee of such an antecedent duty as is described in Subsection (1), if made as interest thereon or part payment thereof or collateral security therefor by the obligor, or by an agent of the obligor whose authority so to act was not given irrevocably before the antecedent duty was barred;

(c) A promise to the obligee of such an antecedent duty as is described in Subsection (1) not to plead the Statute of Limitations as a defense to an action thereon.

3. An executor, administrator, trustee or guardian who makes such a promise as that stated in Subsection (1) cannot by so doing impose a duty upon the estate which he represents. Nor will he be personally bound unless he was bound by the antecedent duty.

Annotation:

Subsection (1) relates expressly to promises and includes those made before as well as after the debt has become unenforceable by the lapse of time. There is no question but that a promise is binding if made after the debt is barred, and, although it has been said that a promise made before the debt is barred is unenforceable unless there is new consideration—*Gilmore* v. *Green*, 77 Ky. (14 Bush) 772, — it is clear that this is merely a rule of procedure denying the right to base the action on such new promise and that otherwise, except as indicated below, it is immaterial whether the promise is made before or after the statute has run — *Crouch's Admr.* v. *Crouch*, 5 K. L. R. 899. However, in case of an acknowledgment, the time of making may be very material (subsection 2a, infra), and special circumstances may also make it important to determine whether a promise was given before or after the statutory period had run. If the promise is made before the debt is barred, the obligation is extended for a period to be determined by the character of the original obligation but if after the debt is barred, the character of the new promise will determine the period of extension — See cases cited under Section 85. Also, if the promise is made after the debt is barred, the new promise and not the original obligation determines the extent of the liability

—*McDonald's Exr.* v. *Underhill's Exr.*, 73 Ky. (10 Bush) 584 (promise to pay principal will not revive as to interest then due);—*West* v. *Williams & Sons*, 202 Ky. 382, 259 S. W. 1015 (Promisor must expressly limit his promise and plead the statute in order to secure this result). Of course, this should also be true of promises made before the debt is barred, but it is not clear that it would be so held in this jurisdiction especially since it is insisted that the action be founded on the old obligation and that the only effect of a promise before the debt is barred is to extend the period of the obligation.

It must be a promise to fulfill all or part of an antecedent contractual or quasi-contractual duty. If an action *ex delicto* is barred by the statute of limitations, it cannot be revived by a promise to pay damages — *Luther and Morgan* v. *Payne*, 197 Ky. 359, 247 S. W. 39. However, by a doctrine of promissory estoppel, if the promise is before the tort action is barred and is relied on by the injured party so that the tort action is delayed, the wrongdoer may be estopped to plead the statute—*Chesapeake & N. Ry.* v. *Speakman*, 114 Ky. 628, 71 S. W. 633; *Luther and Morgan* v. *Payne*, supra (dictum).

It must be a promise to pay all or part of the obligation as such. A promise to leave money by will is not effective unless it is clear that it was intended as a payment and not as a gift—*Schonbachler* v. *Schonbachler*, 22 K. L. R. 314, 57 S. W. 232. Of course, the promise and acknowledgment can be made in a will if it is intended as a payment and as such the transfer is not taxable as a testamentary disposition although the debt was barred at the time of the new promise—*Reamer's Exr.* v. *Coleman*, 226 Ky. 301, 10 S. W. (2d) 1095. It is even held that a promise to pay, if accompanied by a statement that the obligation is unjust, is insufficient, the court here improperly borrowing from the principles governing acknowledgments—*McRoberts* v. *Hays*, 15 K. L. R. 400. It seems that a promise to pay a debt by transferring a horse or other property would be sufficient—*Ditto* v. *Ditto's Adm.*, 34 Ky. (4 Dana) 502. But the promise must refer to the debt, loose statements are not enough—*McGrew's Exr.* v. *O'Donnel*, 28 K. L. R. 1366, 92 S. W. 301.

The promise must be by the debtor or by an agent authorized for that purpose—*Lowe* v. *Thomas' Adm.*, 12 K. L. R. 46, (holding a promise by an attorney did not extend the period of his client's obligation). A promise by an heir to pay debts of the testator is binding if at the time of the promise the debt is *not* barred and is a legal charge on the property received, by the promisor—*Blakemore* v. *Blakemore*, 19 K. L. R. 1619, 44 S. W. 96. But a part payment by a daughter of the debtor if made under mistaken belief as to her liability will not extend the period of the debt—*Rafferty* v. *Bank*, 176 Ky. 145, 195 S. W. 429 (apparently no property received). It seems that a principal can neither revive nor extend the obligation of his surety, but as to the power of a maker of a negotiable instrument to extend the period

against a guarantor, see *Conn* v. *Atkinson*, 227 Ky. 594, 13 S. W. (2d) 759. As to whom the promise must be made, see Section 92, infra.

In Kentucky the promise may be either oral or written, there being no statute requiring a writing—*Reamers' Exr.* v. *Coleman*, supra.

This section expressly excepts promises to pay judgments. It has been held that a part payment of a judgment that is then barred will not revive it, but it is intimated that if the payment had been made before the period had run the obligation would have been continued, and that an express promise after that time would revive it,—*White* v. *Moore*, 100 Ky. 358, 38 S. W. 505. Since the statute expressly requires "the period to be computed from the date of the last execution thereon" (K. S. 2514) there is reason to suppose the Restatement will be followed, that the period will not be computed from the date of a part payment or promise.

In Kentucky this section does not apply to promises, acknowledgments or part payments by a surety. This exception is established by a long line of cases and is the result of the idea of moral consideration. The court points out that since the surety did not receive the consideration, he is legally but not morally bound to pay, and, since there is no moral duty, there is nothing to support the new promise. It is immaterial whether the promise or payment is made before or after the bar is complete. See *Tillett* v. *Commonwealth*, 48 Ky. (9 B. Mon.) 438; *Emmons* v. *Overton*, 57 Ky. (18 B. Mon.) 643; *Pusey* v. *Smith's Admr.*, 12 K. L. R. 604; *Barnard* v. *Applegate*, 13 K. L. R. 683; *Hurst* v. *Anderson*, 14 K. L. R. 766; *Lilly* v. *Farmer's Bank*, 22 K. L. R. 148, 56 S. W. 722; and *Fechheimer* v. *Goldnamer*, 169 Ky. 243, 183 S. W. 541.

However, the statute provides that the limitation period in respect to sureties shall not apply to a period during which the surety obstructs or hinders suit (K. S. 2552) and this has often been invoked to extend the period against a surety, the theory being that a promise may hinder the suit, but the real explanation being that of promissory estoppel (See Section 90, infra.)—*Hamilton's Exr.* v. *Wright*, 27 K. L. R. 1144, 87 S. W. 1093; *Newton* v. *Carson*, 80 Ky. 309; *Walker* v. *Sayers*, 68 Ky. (5 Bush) 579, dictum, but see *Braun* v. *Monroe*, 8 K. L. R. 958; *Kennedy* v. *Foster's Exr.*, 77 Ky. (14 Bush) 479. At least since the adoption of the N. I. L. the obligation of a negotiable instrument is extended, although perhaps not revived, against a subsequent guarantor—assignor by a part payment or payment of interest by himself or by the maker—*Conn* v. *Atkinson*, 227 Ky. 594, 13 S. W. (2d) 759. And the exception never did extend to other defenses by a surety, see Section 89, infra.

Subsection 2 (*a*) says that a voluntary acknowledgment to the obligee admitting the present existence of the duty operates as a promise unless circumstances indicate a different intention. This statement is law in Kentucky. "An acknowledgment, without more

or less, if clearly and satisfactorily proved, will be sufficient to imply a promise to pay"—*Warren* v. *Perry*, 68 Ky. (5 Bush) 447, 451; *Chism* v. *Barnes*, 104 Ky. 310, 319, 47 S. W. 875 and see *Head's Exr.* v. *Manner's Admr.*, 28 Ky. (5 J. J. M.) 255.

But it must be a positive acknowledgment of the obligation as a subsisting debt and such that will warrant the implication of an intention to pay. Loose statements are not sufficient and "if the acknowledgment is accompanied by any circumstances or expressions which repel the idea of any intention or willingness, no implied promise is created"—*Gray* v. *McDowell*, 69 Ky. (6 Bush) 475. In the following cases the acknowledgments were held to be insufficient: *Bell* v. *Rowland's Admr.*, 3 Ky. (Hardin) 309 (Statement that the debt was once owing but supposed paid); *Tillett* v. *Linsey & Co.*, 29 Ky. (6 J. J. M.) 337 (Statement that the account was just, as far as the debtor knew but that he did not know and the creditor owed him money); *Head's Exr.* v. *Manner's Admr.*, 28 Ky. (5 J. J. M.) 255 (Bare acknowledgment by an executor is not enough as the executor is not expected to know whether the debt is owing or not) *Ditto* v. *Ditto's Admr.* 34 Ky. (4 Dana) 502 (Admission of some obligation coupled with statement that some of the items were listed too high); *Gray* v. *McDowell*, supra (Admission coupled with statement that debt is now barred; *Chism* v. *Barnes*, 104 Ky. 310, 47 S. W. 232 (Acknowledgment coupled with statement of inability to pay).

An offer to compromise is not an acknowledgment from which a promise may be implied—*Marcum's Admr.* v. *Terry*, 146 Ky. 145, 142 S. W. 209. Even an express acknowledgment accompanied by an offer to compromise is not sufficient since the offer to compromise shows there is no intention to pay the debt as such—*Chism* v. *Barnes*, supra. However, an acknowledgment coupled with a counter-claim will extend the period of the debt less the amount of the counter-claim—*Lamkins* v. *Carbron's Admr.*, 194 Ky. 246, 238 S. W. 766.

In a few of the cases, the court speaks only of acknowledgments before the action is barred, with the implication that a subsequent acknowledgment would not revive the legal duty. This distinction is a minority view and unsound (Williston on Contracts, Section 163) and has not been actually applied in this state. The question was seemingly raised by counsel and ignored by the Court in *Sumrall's Exrs.* v. *James*, 221 Ky. 498, 299 S. W. 207. The statement in other cases that it must be an acknowledgment of a "present existing debt" refers to the manner and not the time of making. However, it is possible that words which would be sufficient to extend the debt if spoken before the statute had run, would be insufficient to revive the debt since in the former case the action is on the original obligation and in the latter it must be on the words—*Lamkins* v. *Cambron's Admr.*, supra.

The acknowledgment "must be made to the creditor or someone

authorized to act for him; it is not enough if it be made to a stranger"—*Davis* v. *Strange*, 156 Ky. 420, 161 S. W. 217; *Dowell* v. *Dowell's Admr.*, 137 Ky. 167, 125 S. W. 283; *Hargis* v. *Sewell*, 87 Ky. 63, 7 S. W. 557.

Subsection 2 (*b*) states the law in this jurisdiction. A payment in money, either as a partial payment of the principal or as interest will be sufficient either to extend the statutory period or to revive an obligation that has been barred—*Richardson's Admr.* v. *Morgan*, 233 Ky. 540, 26 S. W. (2d) 32; *Conn* v. *Atkinson*, 227 Ky. 594, 13 S. W. (2d) 759; *Kennedy* v. *Kennedy*, 197 Ky. 784, 248 S. W. 182; *Radford's Admrs.* v. *Harris*, 144 Ky. 809, 139 S. W. 963. Giving the creditor other property to sell and apply on the debt is also sufficient —*King* v. *Nichols*, 12 K. L. R. 293; *Brown's Admr.* v. *Osborne*, 136 Ky. 456, 124 S. W. 405; *Kennedy* v. *Kennedy*, supra—as is the giving of collateral security—*Maddox* v. *Walker's Exr.*, 25 K. L. R. 124, 74 S. W. 741 (In this case the mortgage contained a statement that the debt was due.)

But to have this effect it must be a voluntary payment by the debtor or his authorized agent for that purpose. A payment by a stranger is not sufficient—*Gallagher* v. *Whalen*, 10 K. L. R. 458, 9 S. W. 390 (By widow of debtor); *Rafferty* v. *Bank*, 176 Ky. 145, 195 S. W. 429 (Payment by heir. But as to a promise or payment by an heir or devisee who has received property which at the time is charged with the payment of the debt, see *Blakemore* v. *Blakemore*, 19 K. L. R. 1619, 44 S. W. 96). The holder of a note cannot extend or revive it by an unauthorized entry of credit on a cross debt—*Richardson's Admr.* v. *Morgan*, 233 Ky. 540, 26 S. W. (2d) 32; *Samuel* v. *Samuel's Admr.*, 151 Ky. 235, 151 S. W. 676; *Brown's Admr.* v. *Osborne*, 136 Ky. 456, 124 S. W. 405. But it seems that a bank might apply the balance in a checking account as part payment on a note and so extend the period of limitations—*Commonwealth* v. *Bank of Kentucky*, 5 Ky. Opin. 190—and even a gift by the creditor proved by an entry on the note made with the consent of the debtor will have this effect—*Kennedy* v. *Kennedy*, supra.

Not only must the payment be made by the debtor or his authorized agent, but it must be made as a payment on the debt to which the statute applies. "A payment which is made by the debtor under the impression he is paying something else has never the effect of reviving the debt"—*Price's Admx.* v. *Price's Admx.*, 111 Ky. 771, 786, 64 S. W. 746 (In this case the debtor agreed to pay an annuity which was a little in excess of the interest on the debt and the debt was released. Twenty years later it was claimed on behalf of the creditor that the agreement was void and the court replied that even if the agreement to pay the annuity was void, the original obligation was barred since the payment of the annuity did not keep it alive). Although several notes are given in one transaction, the payment on

one does not extend the period as to the others—*Pitchford* v. *Gatewood's Admr.*, 10 K. L. R. 112. The debtor, in making payment, has a right to direct the application of the payment to any particular debt and only that debt will be extended or revived by the part payment—*Brown's Admr.* v. *Osborne*, 136 Ky. 456, 124 S. W. 405; *Samuel* v. *Samuel's Admr.*, 151 Ky. 235, 151 S. W. 675. In absence of a direction by the debtor the creditor may apply the payment to any of the debts which are not then barred, or he may distribute it so as to extend the period as to all—*Samuel* v. *Samuel's Admr.*, supra. In absence of direction by the debtor or application by the creditor, it seems that the law will authorize the application to the oldest debt—*Brown's Admr.* v. *Osborne*, supra. Part payments on account give trouble. If it is liquidated, a part payment will revitalize the whole account unless the debtor directs the payment to some particular item, and this is true where the debtor knows the items charged for but does not know the exact amount, but it can not be applied to any item which the debtor did not know of or have in mind when paying —*Brown's Admr.* v. *Osborne*, supra; *Price's Adm.* v. *Price's Admr.*, supra (dictum at p. 787). But in a suit for board extending over a nine year period, it was held that each year gives a separate cause of action and the payments made from time to time were to be credited only on the account for the year in which made, with the result that board for the last five years only may be recovered—*Kellum* v. *Browning's Admr.*, 231 Ky. 308, 21 S. W. (2d) 459.

The payment must also be one that "will authorize the inference of a promise to pay the residue"—*Richardson* v. *Chanslor's Trustee*, 103 Ky. 425, 438, 45 S. W. 774 (Partial payment made in full settlement is not sufficient).

Subsection 2 (*c*) states that a promise not to plead the Statute of Limitations is equivalent to a promise to pay the debt. Of course, if the promise is made at the time of the formation of the contract it is supported by consideration and hence is not included in this section. However, it may be mentioned that our courts have held agreements *in advance* not to plead the Statute of Limitations, or those lengthening or shortening the period, to be void as against public policy, *Union Central Life Ins. Co.* v. *Spinks*, 119 Ky. 261, 83 S. W. 615 discusses fully and cites the decisions prior to 1904. For later discussion see *Continental Casualty Co.* v. *Harrod*, 30 K. L. R. 1117, 100 S. W. 262; *Travelers' Ins. Co.* v. *Henderson Cotton Mills*, 120 Ky. 218, 85 S. W. 1090; *Maryland Casualty Co.* v. *Dickerson*, 213 Ky. 305, 280 S. W. 1106 (dictum) and *Wright* v. *Gardner*, 98 Ky. 454, 33 S. W. 622 (attempt to lengthen the time in which a claim be made). No cases have been found involving promises not to plead the statute which were made after the debt became due and it is possible that such a promise might be considered as an acknowledgment and sufficient for implying a promise to pay in accordance with this section.

Subsection 3 deals with promises by executors, administrators, trustees or guardians. In the older cases it was held that a promise by an executor has the same effect as if it had been made by the testator himself—*Northcut's Admr.* v. *Wilkinson*, 51 Ky. (12 B. M.) 408. This was true even if the debt was barred at the time of the promise—*Head's Exr.* v. *Manners' Admr.*, 28 Ky. (5 J. J. M.) 255 (In which it is held, however, that a bare acknowledgment by an executor is not sufficient); *Thomas* v. *Daniel's Admr.*, 7 K. L. R. 98. But it was later held that at best the action by an administrator only binds the assets in his hands and that the promise will not prevent an heir or devisee from relying on the plea of limitations—*Jones* v. *Mitchell's Adm.*, 9 K. L. R. 858; *Withers' Adm.* v. *Withers' Heirs*, 30 K. L. R. 1099, 100 S. W. 253; *Grotenkemper* v. *Bryson*, 79 Ky. 353 (which implies that an executor can not even subject the assets in his hands to the payment of a debt if the heirs object.) Nor can a city council, without express statutory authority, extend the liability of the city on bonds—*Wurth* v. *City of Paducah*, 116 Ky. 403, 76 S. W. 143.

Section 87. PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY IS BINDING.

Except as stated in Section 93, a promise to pay all or part of a debt of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.

Annotation:

This statement includes promises made after bankruptcy proceedings are begun and before discharge as well as those made after the debt is discharged. Our courts do not go that far. A promise made after the discharge is binding—*Peoples Bank* v. *Baker*, 238 Ky. 473, 38 S. W. (2d) 225; *Damron* v. *Pikeville Grocery Co.*, 222 Ky. 749, 2 S. W. (2d) 366. But it has been held that a promise made before discharge although after proceedings are begun, is not binding—*Graves* v. *McGuire, Helm & Co.*, 79 Ky. 532; *Ogden* v. *Redd*, 76 Ky. (13 Bush) 581. However, if the promise made at this time is supported by new consideration it is binding—*Thornberry's Admr.* v. *Dils*, 80 Ky. 241; see also *Graves* v. *McGuire, Helm & Co.*, supra (dicta, also to the effect that the debtor may be estopped in certain cases). Like a promise to pay a debt barred by the Statute of Limitations, the promise after bankruptcy must be "clear, distinct, and unequivocal" —*Brooks* v. *Paine*, 26 K. L. R. 1125, 77 S. W. 190; *Jones* v. *Talbott*, 13 K. L. R. 303—and the action is based on the new promise and not on the original obligation—*Carson* v. *Osborne*, 49 Ky. (10 B. M.) 155; *Egbert* v. *McMichael*, 48 Ky. (9 B. M.) 44; *Graham* v. *Hunt*, 47 Ky.

(8 B. M.) 7. Unlike the rule in regard to the Statute of Limitations, neither a mere acknowledgment of the obligation nor part payment is sufficient in this case—*Green* v. *McGowan*, 7 K. L. R. 661 (acknowledgment); *Jones* v. *Talbott* (dictum as to acknowledgment); *Tolle* v. *Smith*, 98 Ky. 464, 33 S. W. 410 (part payment).

A conditional promise will be sufficient (see section 91, infra), but the fact that it is conditional must appear in the pleadings and the creditor must also allege and prove the happening of the condition—*Brooks* v. *Paine*, 25 K. L. R. 1125, 77 S. W. 190; *Tolle* v. *Smith*, supra; *Egbert* v. *McMichael*, supra.

This section does not apply to promises made after a voluntary discharge by act of the creditors—*Montgomery* v. *Lampton*, 60 Ky. (3 Met.) 519.

Section 88. PROMISE TO FULFILL A DUTY IN SPITE OF NON-PERFORMANCE OF A CONDITION IS BINDING WHEN.

(1) Except as stated in Subsection (2) and in Section 93, a promise to fulfill all or part of an antecedent conditional duty in spite of the non-fulfillment of the condition is binding, whether the promise is made before or after the time for fulfilling the condition, if performance of the condition is not a substantial part of what was to have been given in exchange for the performance of the antecedent duty, and if the uncertainty of the happening of the condition was not a substantial element in inducing the formation of the contract;

(2) If a promise such as stated in Subsection (1) is made before the time for fulfilling the condition has expired and the condition is some performance by the promisee or other beneficiary of the contract, the promisor can make his duty again subject to the condition by giving notice of his intention so to do before there has been any substantial change of position by the promisee or beneficiary and while there is still reasonable time to perform the condition.

Annotation:

This section covers what is generally entitled "waiver of defenses." That a promise to fulfill a contractual duty in spite of the non-performance of a condition is binding is illustrated by decisions involving conditions in insurance policies—*Aetna Life Ins. Co.* v. *Hartley*, 24 K. L. R. 57, 67 S. W. 19, 68 S. W. 1081 (acts of agent held to imply a promise to pay the policy despite non-performance of condition as to payment of premiums); *Hoover* v. *Hartford Fire Ins. Co.*, 227 Ky. 88, 11 S. W. (2d) 976 (Same except fire insurance); *Mudd* v.

German Ins. Co., 22 K. L. R. 308, 56 S. W. 977. It has been held that an agent has the power to waive performance of conditions in insurance policies by a verbal promise even if the policy provides that no alteration or modification of the contract shall be valid unless evidenced by writing—*New Orleans Ins. Co.* v. *O'Brian*, 8 K. L. R. 785; *German-American Ins. Co.* v. *Yellow Poplar Lbr. Co.*, 27 K. L. R. 105 84 S. W. 551. But see *Old Colony Ins. Co.* v. *Berryman*, 193 Ky. 7, 234 S. W. 748. This section states that such promises are binding without consideration and they have often been treated as an application of the doctrine of estoppel (sec. 90, infra) and in other cases as a new oral contract.

This section is also illustrated by an express or implied promise by a buyer to pay for defective goods—*Jones Bros.* v. *McEwan*, 91 Ky. 373, 16 S. W. 81; *Forsythe* v. *Russell Co.*, 148 Ky. 490, 146 S. W. 1103; *Albin Co.* v. *Kentucky Table Co.*, 23 K. L. R. 2261, 67 S. W. 13. In these cases it is held that acceptance of the goods with knowledge of the defects is sufficient to imply a promise to pay the full contract price or a waiver of the right to recover on a breach of warranty, but this may have been changed by the adoption of the Uniform Sales Act in 1928 (Ky. Stat. 2651b-49). Occupancy of a building is not alone a waiver of the defects in construction—*Cassinelli* v. *Stacy*, 238 Ky. 827, 38 S. W. (2d) 980.

This section is also illustrated by waiver of technical defenses by a surety. See *Young* v. *New Farmer's Bank*, 102 Ky. 257, 43 S. W. 473 (promise to pay after a contract extending time to the maker); *Crutcher* v. *Trabue*, 35 Ky. (5 Dana) 80, 85 (promise by surety before time extended to principal); *Higgins* v. *Morrison's Exr.*, 34 Ky. (4 Dana) 100, 103 (promise after discharge because of lack of notice) *Mardis* v. *Tyler*, 49 Ky. (10 B. M.) 376. But this does not apply to promises after a surety is discharged by effect of the Statute of Limitations as shown by the decisions cited under Section 87.

Section 89. PROMISE TO PERFORM A VOIDABLE DUTY IS BINDING.

Except as stated in Section 93, a promise to perform all or part of an antecedent contract of the promisor, theretofore voidable by him, but not avoided prior to the making of the promise, is binding.

Annotation:

This section would probably be followed in Kentucky although in the few cases which have arisen, the new promise is spoken of as a "ratification" or "waiver" with the original contract as the foundation of the obligation. This is, of course, true in case of conveyances

where the title passes at the time of the deed by the infant and not at the time of the new deed or "affirmance"—*Phillips* v. *Green*, 21 Ky. (5 T. B. Mon.) 344. However, K. S. 470 (2) implies that the suit may be on the new promise.

No case involving a new promise after the discovery of fraud has been found. New promises by sureties are covered under Section 88, supra.

In case of contracts by infants, a new promise after reaching majority is binding—*J. I. Case Machine Co. v. Dulworth*, 216 Ky. 637, 287 S. W. 994 (renewal note). But the promise must be made after reaching majority with the deliberate purpose of assuming a liability from which he knows he is discharged by law, and must be made to the creditor or his agent—*Petty* v. *Roberts*, 70 Ky. (7 Bush) 410. By statute, the new promise must be in writing—K. S. 470 (2). But it seems that the statute is satisfied by a writing addressed to one other than the creditor or his agent—*Stern* v. *Freeman*, 61 Ky. (4 Metc.) 309.

This section relates only to voidable obligations. If a promise by a married woman is void, a new promise made after discoverture is not binding—*Gilbert* v. *Brown*, 29 K. L. R. 1248, 97 S. W. 40; *Holloway's Assignee* v. *Rudy*, 22 K. L. R. 1406, 60 S. W. 650.

Section 90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION IS BINDING.

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided, only by enforcement of the promise.

Annotation:

Our Court in handling this problem frequently escapes the doctrine of promissory estoppel by treating the reasonably induced action as requested, for example, see *Forsythe* v. *Rexroat*, 234 Ky. 173, 27 S. W. (2d) 695 (the court also finds other consideration in this case). And in other cases the Court has reached the same result by making the promise the foundation for an action or defense of fraud, saying "if by means of a promise alone, another is influenced to change his position so that he cannot be placed in *statu quo* and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is fraud"—*Daniel* v. *Daniel*, 190 Ky. 210, 226 S. W. 1070. See also *Tillett* v. *Rainey*, 48 Ky. (9 B. Mon.) 438, but see *Emmerson* v. *Zimmerman*, 5 K. L. R. 767, contra.

In other cases recovery has been allowed on a promise unsupported by consideration as provided by this section—*Morton* v. *Fletch-*

er, 9 Ky. (2 A. K. M.) 137 (a promise by maker to innocent assignee of a note given for an illegal consideration is binding if the assignee relies thereon and thus loses recourse against his assignor); *Cooper* v. *Jackson*, 22 K. L. R. 295, 57 S. W. 254 (a promise of the payee of a note to extend time for an indefinite period if followed by a reasonable forbearance in reliance on the promise of a third party to pay is sufficient).

Section 91. PROMISES ENUMERATED IN SECTIONS 86-90 IF CONDITIONAL ARE PERFORMABLE ONLY ON HAPPENING OF CONDITION.

If a promise within the terms of Sections 86, 87, 88, 89, and 90 is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the happening of the condition or upon the arrival of the specified time.

Annotation:

This section states the law in Kentucky. If the promise is to pay when able, the creditor must prove the ability—*Tolle* v. *Smith's Exr.*, 98 Ky. 464, 33 S. W. 410; *Eckler* v. *Galbraith & Lail*, 75 Ky. (12 Bush) 71; *Mason* v. *Hughart*, 48 Ky. (9 B. Mon.) 480; *Green* v. *McGowan*, 7 K. L. R. 661. And the fact that the promise is conditional must appear in the declaration—*Egbert* v. *McMichael*, 48 Ky. (9 B. Mon.) 44; *Buford* v. *Crigler*, 7 K. L. R. 662. If conditional, the statute of limitations starts to run only from the happening of the condition—*Rankin* v. *Anderson*, 24 K. L. R. 647, 69 S. W. 705.

Of course, if the new promise is contained in an offer to compromise or conditioned upon other act or agreement of the promisee, it is of no effect until acceptance—*Farrell's Admr.* v. *Records*, 187 Ky. 468, 219 S. W. 792; *Marcum's Admx.* v. *Terry*, 146 Ky. 145, 142 S. W. 209. But this has been carried further so as to seemingly require an acceptance of all conditional promises—*Brashears* v. *Combs*, 174 Ky. 344, 192 S. W. 482.

Section 92. TO WHOM PROMISES ENUMERATED IN SECTIONS 86-89 MUST BE MADE.

The new promise referred to in Sections 86, 87, 88, and 89 must be made to the person to whom the money is then due, or to the promisor's surety or co-principal or indemnitor

Annotation:

Kentucky decisions are in accord with this statement. A promise

or acknowledgment to a stranger is not sufficient. The promise must be made to the creditor "or someone authorized to act for him"—*Davis* v. *Strange*, 156 Ky. 420, 161 S. W. 217; *Dowell* v. *Dowell's Admr.*, 137 Ky. 167, 125 S. W. 283. This is frequently stated as "to the creditor, or someone acting for him, and upon which the creditor is to act and confide"—*Hargis* v. *Sewell's Admr.*, 87 Ky. 63, 7 S. W. 557; *Trousdale's Admr.* v. *Anderson*, 72 Ky. (9 Bush) 276; *Bain* v. *Sawyers*, 14 K. L. R. 857.

A promise of one executor to his joint executor was held to be sufficient, but in this case the promisee was also the sole beneficiary of the promise—*Hendrix's Admr.* v. *Hendrix*, 29 K. L. R. 1084, 96 S. W. 921. A promise to the creditor's wife was held to be binding in a case where the debt arose from the sale of her property, but the court speaks as if the relationship would be sufficient—*Jones* v. *Talbott*, 13 K. L. R. 303. The publication by a bank of a financial statement which listed a certified check as a liability is not a sufficient acknowledgment to the creditor—*Blades* v. *Grant County Deposit Bank*, 21 K. L. R. 1761, 56 S. W. 415.

This section is not to be confused with the requirement that in case of contracts made during infancy, the ratification must be in writing (K. S. 470) for it seems that in such a case a writing addressed to a stranger will be sufficient to satisfy the statute of frauds —*Stern* v. *Freeman*, 61 Ky. (4 Metc.) 309.

Section 93. PROMISES ENUMERATED IN SECTIONS 86-89 NOT BINDING IF MADE IN IGNORANCE OF FACTS.

A promise within the terms of Sections 86, 87, 88 or 89 is not binding unless the promisor knew or had reason to know the essential facts of the previous transaction to which the promise relates, but his knowledge of the legal effect of the facts is immaterial.

Annotation:

Our decisions require knowledge of the essential facts at the time the promise is made and goes beyond this statement in seemingly requiring a knowledge of the legal effect of the facts in order to make the promise binding, at least in cases where the promisor is a surety or one other than the original debtor—*Rafferty* v. *Bank of Hardinsburg*, 176 Ky. 145, 195 S. W. 429 (After a cause was barred against an ancestor, voluntary payments by an heir were said not to revive the obligation "since it is clear that these payments were made in ignorance of her rights and in the mistaken belief she was liable for her father's debts"). *Tillett* v. *Rainey*, 48 Ky. (9 B. Mon.) 438 (a surety must act "with knowledge of his legal condition and rights with

respect to the bond"); *Young* v. *New Farmer's Bank*, 102 Ky. 257, 43 S. W. 473 (evidence that a surety, at the time of making the promise, was not aware of having been released by an extention of time, is competent). However, it is not essential that a primary debtor know the legal effect of his promise—*Brashears* v. *Combs*, 174 Ky. 344, 192 S. W. 482. As to knowledge inferred from the promise, see *Mardis* v. *Tyler*, 49 Ky. (10 B. Mon.) 376.

Section 94. STIPULATIONS.

Agreements with reference to a proceeding pending in court, made by attorneys representing adverse parties to the proceeding, are not deprived of legal operation because of lack of consideration, nor, if made in the presence of the Court, because made orally. If not made in the presence of the Court, a writing is generally required by statute or rule of court.

Annotation:

Kentucky decisions are in accord as to the effect of stipulations —*Lincoln County Board of Education* v. *Trustees*, 225 Ky. 21, 7 S. W. (2d) 499; *Continental Realty Co.* v. *Mowbray & Robinson Co.*, 187 Ky. 98, 218 S. W. 726; *Taylor & Crate* v. *Forester*, 148 Ky. 201, 146 S. W. 428.

Seemingly it is not required that the stipulation be in writing, a "verbal" agreement consented to by the court being sufficient—*McCreary County* v. *Bryant*, 173 Ky. 363, 191 S. W. 119 (Made in the presence of the Court in this case); *Chambers* v. *Simpson's Admx.*, 17 Ky. (1 T. B. Mon.) 112. In *McCormick Harvesting Machine Co.* v. *Harned*, 6 K. L. R. 665, the Court refused to recognize an oral stipulation which attempted to avoid written amendments to the pleadings as provided by the Code.

(To be Continued)

KENTUCKY LAW JOURNAL

Volume XXII March, 1934 Number 3

Published four times a year by the College of Law, University of Kentucky: Issued in November, January, March, and May.

Subscription Price $2.50 per Year.....75c per Number

STATE BAR ASSOCIATION JOURNALS

According to a statement recently prepared by Frank P. Barker, of Kansas City, Missouri, for The Association of Bar Journal Editors, only fifteen state bar associations in this country lack an official publication. The state bar associations which have no official publication are located in the following states: Alabama, Arizona, Arkansas, Delaware, Maine, Maryland, Montana, Nevada, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, Washington and Wyoming.

As noted above, The Kentucky State Bar Association has its official publication. It is The Kentucky Law Journal. This valuable and very practical alliance was effected in 1932, largely through the efforts of Mr. William B. Gess, then serving as a vice president of the Bar Association, from the fifth district. This association with the practicing attorneys of the state is much appreciated by the Kentucky Law Journal.